

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**BEXAR COUNTY PERFORMING ARTS CENTER
FOUNDATION D/B/A TOBIN CENTER FOR THE
PERFORMING ARTS**

and

Case No. 16-CA-193636

LOCAL 23, AMERICAN FEDERATION OF MUSICIANS

Eva Shih, Esq.

for the General Counsel.

Donna K. McElroy and Hannah L. Hembree, Esqs.

(Dykema Cox Smith, San Antonio, Texas)

for the Respondent.

David Van Os, Esq., (San Antonio, Texas) for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in San Antonio, Texas on October 10 and 11, 2017. Local 23 of the American Federation of Musicians filed the initial charge on February 21, 2017. The General Counsel issued the complaint on June 30, 2017.

The General Counsel alleges that Respondent, Bexar County Performing Arts Center Foundation (hereinafter the Tobin Center), violated Section 8(a)(1) of the Act by prohibiting musicians employed by the San Antonio Symphony from handing out leaflets in front of the Tobin Center on February 17-19, 2017. The musicians, members of Local 23, were protesting the use of recorded, instead of live, music, by the San Antonio Ballet in the performances of Tchaikovsky's *Sleeping Beauty*.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a non-profit corporation which operates the Tobin Performing Arts Center in San Antonio, Texas. In the year prior to the filing of the charge, Respondent derived gross revenues in excess of \$1,000,000. It also purchased and received goods and materials during that year valued in excess of \$5,000 directly from points outside of Texas. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.¹

II. ALLEGED UNFAIR LABOR PRACTICES

The Tobin Center

The Tobin Center, which opened in 2014, was built with city, county and private funding on the former site of the San Antonio Municipal Building. Upon the opening of the Tobin Center, the City of San Antonio conveyed the deed to the Tobin Center to the Bexar County Performing Arts Center Foundation. The Tobin Center and the sidewalks surrounding it are private property.

The Tobin Center has 3 performing arts venues; the H-E-B Performance hall, which seats 1750 patrons; the Caesar Alvarez Studio Theater, which seats 300 and the Will Smith Plaza Outdoor theater, which seats 1000.

Respondent has use agreements with 3 principal resident companies and several associate resident companies. The principal resident companies are the San Antonio Symphony, the San Antonio Ballet and the San Antonio Opera. The relationship between the Tobin Center and the resident companies is that of lessor and lessee.

Leafleting of The Tobin Center by Symphony Musicians and sympathizers

The San Antonio Ballet uses live music, performed by San Antonio Symphony musicians in some productions, but not others. It has used such live music at holiday performances of *The Nutcracker*, but generally has used recorded music at its spring performances, including the February 2017 production of Tchaikovsky's *Sleeping Beauty*.

The use of recorded music by the Ballet has an adverse economic impact on the Symphony musicians. For that reason, Local 23 decided to pass out leaflets before the 4 performances of *Sleeping Beauty* on February 17 through February 19 (Friday and Saturday nights; Saturday and Sunday matinees). Sympathizers, who did not work at the Tobin Center, including some members of the International Brotherhood of Electrical Workers, agreed to assist in passing out these handbills.

¹ However, Respondent is not the employer of the symphony musicians.

Management of the Tobin Center became aware of the Union's plan to leaflet the performances beforehand. At a meeting on February 14, Michael Fresher, the President of the Tobin Center, instructed his staff not to permit anyone to hand out leaflets, promote or solicit on the Tobin Center grounds. On the evening of September 17, 12-15 Symphony musicians and their sympathizers gathered in front of a building across the street from the Tobin Center. Several individuals crossed the street onto the sidewalk in front of the main entrance to the Tobin Center with their flyers. They were immediately met by Tobin Center management and agents and told they could not distribute flyers anywhere on Tobin Center property, including the sidewalks in front of the facility. At this hearing, Respondent stated that it would also prohibit such distribution and solicitation in the parking lots which belong to the Tobin Center.

The musicians and their sympathizers were thus required to distribute their leaflets at places off the Tobin Center property, such as the sidewalks across the street from the main entrance. At these locations the leafleters were able to distribute a number of handbills, possibly several hundred.²

The leaflet read as follows:

A Live Orchestra for Live Dancers.

You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky's score over loudspeakers. You've paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!

The Tobin Center employs security personnel at all performances. During at least some of the performances of *Sleeping Beauty*, the Tobin Center employed extra security personnel for reasons unrelated to the union handbilling.

The relationship of the San Antonio Symphony Musicians with the Tobin Center

Symphony musicians are employed by the San Antonio Symphony, a lessee of the Tobin Center. The relationship between the Tobin Center and the Symphony is governed by a Use Agreement, G.C. Exh. 4. The Symphony is entitled to use the Tobin Center for performances and rehearsals 22 weeks of the year. Local 23 has a collective bargaining agreement with the Symphony, not with the Tobin Center.³ That agreement provides for 30 work weeks within a 39 week period between September and June. In 2016-17, the musicians worked 27 weeks for the Symphony and were furloughed for 3 weeks.

² Of course, the leafleting may have been even more effective had the leafleters been able to distribute the handbills closer to the entrance of the Tobin Center, where the density of patrons would have likely been greater than across the street.

³ The Union has a separate collective bargaining agreement with the San Antonio Opera.

Symphony musicians perform most, by not 100%, of their services; i.e., performances and rehearsals, for the Symphony inside the Tobin Center. In 2014-15, 97% of the services rendered by symphony musicians to the Symphony, Opera or Ballet occurred at the Tobin Center, G.C. Exh. 13; 84% in 2015-16; G.C. Exh. 15 and 93% in 2016-17, G.C. Exh. 17, Tr. 243-46.

While the Symphony is leasing space from the Tobin Center (generally the entire year except for the summer months) symphony musicians use the Tobin Center breakroom for breaks and for union meetings. Some store their instruments (e.g., large instruments such as the Harp) at the Center. The Symphony also maintains a library at the Tobin Center staffed by a Local 23 bargaining unit member.

Legal Analysis

Respondent relies principally on the U.S. Supreme Court decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which the Court held that property owners may bar nonemployee union organizers from their premises except in limited circumstances. There is a limited exception where the Union does not have reasonable access to the target employees. The General Counsel and the Union rely on the Board's decision in *New York New York Hotel and Casino*, 356 NLRB 907 (2011) enfd. 676 F. 3d 193 (D.C. Cir. 2012), cert den. 133 S.Ct. 1580 (U.S. 2013).

In *New York New York* the Board held that the hotel violated Section 8(a)(1) by prohibiting employees of Ark, a food service contractor, to distribute union literature on the sidewalks and a driveway in front of the hotel, which was hotel property. These employees worked at restaurants inside the hotel. The Board held that a property owner may lawfully exclude from non-work areas, off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason. In *New York New York*, the Board specifically stated that *Lechmere* did not apply to the situation presented, 356 NLRB at 913.

In *Simon DeBartolo Group*, 357 NLRB 1887, 1888 n. 8 (2011) the Board rejected the employer's argument that its holding in *New York, New York* applied only in situations in which the contractor's employees worked exclusively on the owner's property. As in that case, it is clear that symphony musicians worked regularly at the Tobin Center. I find that this case is governed by *New York New York* and *Simon DeBartolo*, rather than by *Lechmere*. I therefore find that by prohibiting the handbilling in this case, Respondent violated Section 8(a)(1) of the Act.

Unlike the employees in *New York, New York*, the musicians in this case were not engaged in organizational handbilling as were the restaurant employees in *New York New York*. Another distinction is that the musicians did not have a dispute with their employer; their dispute was with another licensee, the San Antonio Ballet.⁴ I find that neither distinction is material for the reasons stated in the following paragraph.

The musicians had a dispute that effected their wages, hours and working conditions. They are entitled to appeal to the public for help in such matters. Although, the Tobin Center could not rectify their loss of work, the public might be able to do so by lobbying for increased funding for the Ballet. In this regard, it is well settled that employees are protected under the “mutual aid or protection” clause of Section 7 when they seek to improve their lot as employees through channels outside the immediate employee-employer relationship, *Eastex Inc. v NLRB*, 437 U.S. 567, 565 (1978); *Five Star Transportation, Inc.*, 349 NLRB 42, 47 (2007) enfd. 522 F. 3d 46 (1st Cir. 2008) [an appeal by school bus drivers to a school board, asking that it not award a contract to the Respondent, which was not their employer].

Although Respondent argues that it had no control over Symphony employees, the Use Agreement, G.C. Exh. 4, gives it powers similar to those of New York, New York vis-à-vis Ark employees. Section 4(1) of that agreement requires the User (the Symphony) to cause its servants, agents, employees, etc. to abide by all rules and regulations as may from time to time be adopted by the Operator (Tobin). Section 4(5) allows Tobin to refuse admission to or cause to be removed from the Premises or the Theater any disorderly or undesirable person as determined by the Operator (Tobin) in its reasonable discretion. There is no reason to conclude that “person” in Section 4(5) does not include employees of the Symphony.

Section 11(2) of the Use Agreement warrants that the User (the Symphony) has under its direct control all performers, staff, personnel and other participants in the Event and shall hold harmless and indemnify the Operator for the actions or omissions of any such staff employed or engaged by the User.⁵

Respondent also points out that pursuant to its deed, the Tobin Center is not open to the public at all times. While that may be true for the interior of the Tobin Center, the sidewalks surrounding the Tobin Center, where the Union desired to leaflet, is open to the public at all times. Even if that were not the case, those sidewalks were open to the public in the hour before the Ballet’s performance of *Sleeping Beauty*, at which time the symphony musicians and their supporters attempted to distribute their leaflets to the public.

⁴ The General Counsel and Charging Party rely in part on the fact that Respondent allowed a car dealership to display two automobiles at the entrance of the Tobin Center-without advertising. Thus, they argue that Respondent should be found to have violated the Act because its no solicitation policy was disparately applied. I decline to decide this case on that basis. In a somewhat different context the Board has held that an employer does not violate the Act by a small number of “beneficent acts” as narrow exceptions to its no-solicitation rule, *Hammary Manufacturing Corporation*, 265 NLRB 57 n. 4 (1982); *Serv-Air, Inc.*, 175 NLRB 801 (1969). While the car dealership is not a charity, as were the beneficiaries of the “beneficent acts” in the cited cases, it was allowed to display its vehicles in exchange for sponsorship of the Tobin Center. Regardless, of whether the “beneficent acts” exception applies to this case, the display of the automobiles should not be determinative of this case.

⁵ Respondent also states that the Symphony provides no services or supplies to the Tobin Center, similar to those provided by Ark to the New York New York hotel. However, the Symphony pays the Tobin Center for the use of its venues, which I deem to be functionally the equivalent to the services provided by Ark.

Tobin also contends that it had a legitimate business reason for prohibiting symphony musicians from distributing handbills to the public on its property. I find that it failed to establish that this is so. First of all the leafleters were not advocating a boycott of the Tobin Center on in any way trying to influence anybody to reduce their patronage of the Tobin Center or the San Antonio Ballet. Their objective was solely to increase their employment opportunities in conjunction with the performances of the Ballet.

Respondent suggests that it needed to prevent patrons of the ballet from having to “wade through” the leafleters. Given the broad expanse of the sidewalk in front of the Tobin Center and limited number of leafleters, there is no evidence that these individuals did, or would have, impeded access to the Tobin Center. While that might be true if there were many more handbillers or if they stationed themselves right in front of the doors to the auditorium, those are hypothetical situations not present in this case.

Respondent also raises hypothetical security concerns since it is a “soft target” for terrorists. However, there is has been no showing that it had any legitimate security concern with regard to the union’s handbilling. Respondent knew in advance who was going to handbill and the reason for the leafleting. It had no reason to suspect violence on the part of those doing the leafleting. There is no evidence that any of the leafleters were going to be wearing backpacks (a concern at any public gathering since the Boston Marathon bombing). Moreover, whatever danger of terrorism existed on the sidewalk in front of the Tobin Center existed across the street—almost to the same extent.

Finally, the possibility of accumulation of discarded leaflets on the ground presents no rationale for denying symphony musicians the opportunity to exercise their Section 7 rights on the sidewalk in front of the Tobin Center. First of all, leaflets distributed on the other side of the street were just as likely to be discarded on Tobin Center property as those handed out adjacent to it. Moreover, ballet performances generally distribute programs which are also likely to end up on the grounds of the Tobin Center. There is no evidence that the handbilling created an actual litter problem.

Conclusion of Law

In sum there is nothing to materially distinguish this case from the Board’s decision in *New York New York*. Therefore, I find that Respondent violated Section 8(a)(1) in preventing symphony employees from distributing flyers on the sidewalk in front of the Tobin Center between February 17 and 19, 2017. This conclusion does not apply to sympathizers of those employees who were not symphony employees.⁶

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

⁶ This case was tried by the General Counsel on the theory that pursuant to *New York New York* Respondent could not prohibit leafleting by employees who regularly work at the Tobin Center. Due to this, I did not address the issue of whether Respondent could prohibit employees who did not regularly work at the Tobin Center from distributing flyers on its property. However, since the sidewalks in front of the Tobin Center were open to the public at the times material to this case, it is not clear that Respondent could have legally prevented these individuals from leafleting on the Tobin Center sidewalk, *Baptist Medical System*, 288 NLRB 882 (1988); *Montgomery Ward & Company*, 265 NLRB 60 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Bexar County Performing Arts Center Foundation (doing business as the Tobin Center), its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting and/or preventing off-duty employees who are regularly employed at the Tobin Center, including employees of the San Antonio Symphony, from engaging in handbilling in nonworking areas of the Tobin Center property when that handbilling relates to wages, hours or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

Within 14 days after service by the Region, post at its San Antonio, Texas facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and employees of its lessees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and/or employees of its lessees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent or its lessees at any time since February 17, 2017.

5

Dated, Washington, D.C. December 5, 2017



10

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit and/or prevent off-duty employees who are regularly employed at the Tobin Center, including employees of the San Antonio Symphony and other lessees, from engaging in handbilling relating to wages, hours or other terms and conditions of employment in nonworking areas of the Tobin Center property.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

**BEXAR COUNTY PERFORMING ARTS
CENTER FOUNDATION D/B/A TOBIN
CENTER FOR THE PERFORMING ARTS**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-193636 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2925.